

JSF/SJS  
10-101

IN THE CIRCUIT COURT OF THE 4th  
JUDICIAL CIRCUIT IN AND FOR  
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2011-CA-002567-XXXX-MA

CV-D

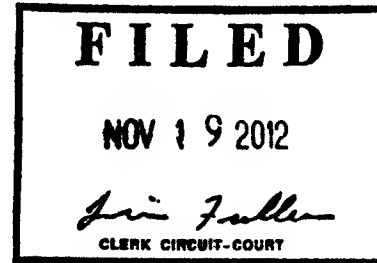
A.D. and S.T., individually and on behalf  
of their adopted children, J.D. and W.D.,

Plaintiffs,

vs.

FAMILY SUPPORT SERVICES OF  
NORTH FLORIDA, INC., a Florida  
corporation, and BOYS' HOME  
ASSOCIATION, INC., a Florida  
corporation,

Defendants.



**PLAINTIFFS' MOTION TO STRIKE DEFENDANT  
FAMILY SUPPORT SERVICES OF NORTH FLORIDA, INC.'S  
AFFIRMATIVE DEFENSES TO PLAINTIFFS' FIRST AMENDED COMPLAINT**

COME NOW the Plaintiffs, A.D. and S.T., individually and on behalf of their adopted children, W.D. and J.D., by and through undersigned counsel, and pursuant to Rule 1.140 of the Florida Rules of Civil Procedure, hereby file this Motion to Strike Defendant, FAMILY SUPPORT SERVICES OF NORTH FLORIDA, INC.'S (hereinafter "Defendant") First, Third through Sixth, and Eleventh through Sixteenth Affirmative Defenses, and as grounds therefor, state:

1. On or about September 21, 2012, Plaintiffs filed their First Amended Complaint. See Exhibit "A."
2. On or about October 26, 2012, Defendant filed its Answer and Affirmative Defenses to First Amended Complaint. See Exhibit "B."

3. Many of the Defendant's affirmative defenses are legally insufficient and should therefore be stricken.

4. Defendant's First Affirmative Defense should be stricken as legally insufficient inasmuch as the protections which apply to state entities do not extend to its independent contracted community-based providers and this Defendant is not entitled to sovereign immunity.

This defense asserts that:

With respect to all matters alleged in the Amended Complaint, FSSNF has performed public functions normally performed by governmental agencies and is entitled to sovereign immunity protections and damages caps.

Section 409.1671, Florida Statutes, sets forth its own statutory scheme for protections and limits and specifically addresses the issue of liability making it clear that the Defendant is not an agent of the Department.

In 1996, the Florida Legislature established a community-based care system to strengthen community support and increase accountability for the state's child welfare program. *See Fla. Stat. §409.1671* (explicitly stating that it is the intent of the Legislature that the Department of Children and Family Services shall outsource<sup>1</sup> the provision of foster care and related services statewide in order to encourage communities and other stakeholders in the well-being of children to participate in assuring that children are safe and well-nurtured). One of the primary reasons in which the Legislature determined that outsourcing services was an appropriate course of action was "to increase the level of safety, security, and stability of children who are or become the responsibility of the state" by allowing foster children "the right

---

<sup>1</sup> The Legislature stated that as used in this section, the term "outsource" means to contract with competent, community-based agencies. *Fla. Stat. § 409.1671(1)(a)*.

to recover for injuries beyond the limitations provided by s. 768.28.” *Fla. Stat. § 409.1671(1)(f)(1)*. Section 409.1671, Florida Statutes, explicitly states:

(1)(f) 1. The Legislature finds that the state has traditionally provided foster care services to children who have been the responsibility of the state. **As such, foster children have not had the right to recover for injuries beyond the limitations specified in s. 768.28. The Legislature has determined that foster care and related services need to be outsourced pursuant to this section and that the provision of such services is of paramount importance to the state. The purpose for such outsourcing is to increase the level of safety, security, and stability of children who are or become the responsibility of the state. One of the components necessary to secure a safe and stable environment for such children is that private providers maintain liability insurance.** As such, insurance needs to be available and remain available to nongovernmental foster care and related services providers without the resources of such providers being significantly reduced by the cost of maintaining such insurance.

**2. The Legislature further finds that, by requiring the following minimum levels of insurance, children in outsourced foster care and related services will gain increased protection and rights of recovery in the event of injury than provided for in s. 768.28.**

(emphasis added). To achieve that end, the lead community based care providers and their subcontractors are required to meet certain state and federal requirements, including the maintenance of specified levels of liability insurance.<sup>2</sup> *Fla. Stat. § 409.1671*.

In 1999, the following language was added to section 409.1671(1)(k):

---

<sup>2</sup> In 2011, bills were introduced in both the Florida House of Representatives (H.B. 1019) and Florida Senate (S.B. 1500) seeking to decrease the limits of liability and requisite insurance coverage for lead community-based providers and subcontractors, to provide immunity from liability for DCF for acts or omissions of a community-based provider or subcontractor, or the officers, agents, or employees thereof, and to delete legislative findings that the minimum levels of insurance were to be in excess of the rights of recovery under section 768.28, Florida Statutes. After substantial opposition, both bills died on the floor, were indefinitely postponed, and withdrawn from consideration.

**The liability of a subcontractor of an eligible lead community-based provider that is a direct provider of foster care and related services as described *in this section* shall be exclusive and in place of all other liability of such provider. The same immunities from liability enjoyed by such subcontractor provider shall extend as well to each employee of the subcontractor when such employee is acting in further of the subcontractor's business . . . .**

*Fla. Stat.* §409.1671(1)(k) (2011) (emphasis added). This language, added by Chapter 99-206, Laws of Florida, was based on Senate Bill 660 (1999) and House Bill 2091 (1999). On April 23, 1999, House Bill 2091 (1999) died on the floor and its companion bill, the Committee Substitute for Senate Bill 660, was approved by the Governor on May 26, 1999. A review of the legislative analyses of these bills and their amendments demonstrates that the Defendant's argument regarding the application of sovereign immunity is completely without merit.

Notably, in the 1999 session, the Florida Senate initially considered and subsequently *rejected* the following proposed amendment:

15	Any provider that furnishes foster care
16	under a contract with the Department of Children and Family
17	Services is deemed to be a corporation acting primarily as an
18	instrumentality of the state, and the limitations on tort
19	actions contained in section 768.28, Florida Statutes, shall
20	apply to any action brought against the provider with respect
21	to such foster care services if the provider is acting within
22	the scope of and pursuant to guidelines established in the
23	contract or by rule of the Department of Children and Family
24	Services. A contract must provide for the indemnification of
25	the state by the provider for any liabilities that may be
26	incurred by the state due to negligence of the provider, up to
27	the limits established under section 768.28, Florida Statutes,
28	in addition to all defense costs incurred by the state.

The Final Analysis of the Committee Substitute for Senate Bill 660, which was approved by the Governor on May 26, 1999, explicitly distinguishes private providers in other contexts who can be considered agents of the state from providers in the area of foster care:

Currently, s. 768.28, F.S., applies to many different private providers under contract with state agencies. For example, under s. 768.28(10)(a), F.S., health care vendors under contract with the Department of Corrections to provide health care services to inmates of the state correctional system are considered agents of the state. Section 768.28(11)(a), F.S., specifies that providers under contract with the Department of Juvenile Justice providing services to children in need of services, families in need of services, or juvenile offenders are also agents of the state.

In the area of foster care, section 409.175(14)(a), F.S., directs the Division of Risk Management of the Department of Insurance to provide coverage through the department to any person who owns or operates a licensed family foster home for the department in her or his place of residence. The coverage is provided from the general liability account of the Florida Casualty Insurance Risk Management Trust Fund and is limited to general liability claims arising from the provision of family foster home care pursuant to an agreement with the department and pursuant to guidelines established through policy, rule, or statute.

With the exception of family foster homes as defined in s. 409.175(14), F.S., **licensed providers of child foster care services who contract with the department are considered independent contractors by the Division of Risk Management, and thus ineligible to invoke the protection of the limitation on tort actions contained in s. 768.28, F.S. This exposure can result in civil damage awards against the provider exceeding the \$100,000/\$200,000 limits applicable to the state.**

(emphasis added). Moreover, the Section-By-Section analysis provides that:

Section 2. Amends s. 409.1671, F.S.

Specifies certain insurance requirements and liability limits for community-based agencies and their subcontractors. In particular, these provisions require lead agencies to obtain general liability insurance and subcontractors to be covered by general liability insurance. They also specify that the agencies and their subcontractors will be responsible for net economic damages in any claims successfully brought by an injured party. The effect of these provisions will be that the state will not be responsible for such damages. **This requirement underscores that an “employee or agency relationship” does not exist between the department**

**and the community-based organizations and their subcontractors.**

(emphasis added).

Reading the Legislature's Final Analysis in its entirety as well as the explicit language of section 409.1671, Florida Statutes, it is clear that language found in section 409.1671(1)(f)-(k) was intended to supplant section 768.28 limitations on liability for lead agencies and their subcontractors, and to extend to their employees immunity from liability in excess of the caps set forth in section 409.1671, Florida Statutes, limited by the exception for defendants who act in a culpably negligent manner or with willful and wanton disregard or unprovoked physical aggression and cause injury and death. No provision of section 409.1671, Florida Statutes, can be reasonably construed to extend sovereign immunity to community-based child welfare agencies or their subcontractors. To the contrary, section 409.1671, Florida Statutes, explicitly permits foster children the right and ability to recover monetary sums for injuries beyond and in place of the limitations provided by section 768.28, Florida Statutes, from community-based child welfare agencies or their subcontractors. A specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. *Mortgage Electronic Registration Sys. v. Mahler*, 928 So. 2d 470 (Fla. 4th DCA 2006).

It is axiomatic that in construing a statute, courts begin with the "actual language used in the statute." *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198 (Fla. 2007) (citations omitted); *Perry v. State*, 968 So. 2d 70 (Fla. 4th DCA 2007). Accordingly, when a statute is clear, unambiguous, and addresses the matter in issue, the courts will not look behind the statute's plain language for legislative intent and the statute must be enforced as written. *Daniels*

*v. Dep't of Health*, 898 So. 2d 61 (Fla. 2005). As set forth above, section 409.1671, Florida Statutes, unequivocally states that the purpose of outsourcing the provision of child welfare services is to give foster children “increased protection and rights of recovery” beyond and in place of the limitations specified in section 768.28, Florida Statutes. Furthermore, it is equally well-established that “a more specific statute covering a particular subject is controlling over a statutory provision covering the same subject in more general terms.” *Kiesel v. Graham*, 388 So. 2d 594, 595 (Fla. 1st DCA 1980) (citations omitted); see *Adams v. Culver*, 111 So. 2d 665, 667 (Fla.1959). While section 768.28, Florida Statutes, addresses sovereign immunity limits in general, section 409.1671, Florida Statutes, specifically addresses the liability limits of lead community-based providers and their subcontractors. Thus, even assuming for purposes of argument that the protections of section 768.28 could be properly applied to a lead CBC, to the extent that these statutes conflict in any matter, section 409.1671 “trumps” section 768.28 and its provisions prevail.

Even if section 768.28 were controlling, it is clear that there is no agency relationship between the Department and the Defendant. In order to establish an agency relationship under Florida law, (1) the principal must “acknowledge that the agent will act for it; (2) the agent must accept the undertaking; and (3) ***the principal must have control over the actions of the agent.*** *State v. Am. Tobacco Co.*, 707 So. 2d 851, 856 (Fla. 4th DCA 1998) (emphasis supplied) (citing *Goldschmidt v. Holman*, 571 So. 2d 422 (Fla. 1990)). ***Control*** is the key element in establishing an agency relationship. *Id.* (emphasis added).

Moreover, in addition to the requirement of mutual consent of principal and agent, an agency relationship can exist only where the principal exercises a right of control over the manner and performance of the duties of the agent. *Id.* This right of control is what

distinguishes an agent from an independent contractor. *See, e.g., Vermeulen v. Worldwide Holidays, Inc.*, 922 So. 2d 271 (Fla. 3d DCA 2006); *Lee v. American Family Life Assur. Co. of Columbus*, 431 So. 2d 249 (Fla. 1st DCA 1983). Whether the Defendant is an agent of the Department depends on the degree of control retained or exercised by the Department. *Stoll v. Noel*, 694 So. 2d 701, 703 (Fla. 1997). The Supreme Court has held that “the right to control depends upon the terms of the employment contract.” *Id.* at 703. “The degree of control retained or exercised may certainly be determined by a single contract . . . [and] an evaluation of a single contract may be a question of law to be determined by the court.” *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853 (Fla. 2003). “Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.” *Parker v. Domino’s Pizza, Inc.*, 629 So. 2d 1026, 1027 (Fla. 4th DCA 1994) (citing *Cawthon v. Phillips Petroleum Co.*, 125 So. 2d 517 (Fla. 2d DCA 1960)).

Pursuant to section 409.1671, Florida Statutes, the Department of Children and Families may contract [with a lead community-based provider] for the delivery, administration, or management of protective services . . . relating to foster care.” *Fla. Stat.* § 409.1671(2)(1) (2006). However, the Department does not exercise control over the lead community-based agency’s daily operations and provision of services, it merely maintains the right to establish policies and procedures for monitoring the quality of the contract and the delivery of services. *Id.* § 409.1671(2)(a), (4)(a). Section 409.1671(2)(a) states as follows:

The department shall retain responsibility for the quality of contracted services and programs and shall ensure that services are delivered in accordance with applicable federal and state statutes



and regulations. The department must adopt written *policies and procedures* for *monitoring* the contract for delivery of services by lead community-based providers. These policies and procedures must, at a minimum, address the evaluation fiscal accountability and program operations, including provider achievement of performance standards, provider monitoring of subcontractors, and timely followup of corrective action plans for significant monitoring findings related to providers and subcontractors. ...

Under the outsourcing statute, the department maintains no right to control the lead community-based provider's daily operations other than through monitoring the quality of services so there is no agency relationship. *See id.*

Based on agency law, the plain and unambiguous language of the statute, and the legislative history, the Defendant is not an agent of the Department and is not entitled to sovereign immunity.

Even if the Court were to somehow find that Defendant was an agent of the state or a state agency for which section 768.28 immunity applies, it would still not be entitled to the protections of sovereign immunity. The Defendant's role as a contracted community-based agency responsible for foster care and related services, including adoption services, in Duval and/or Nassau Counties, and its failure to protect the Plaintiffs from further harm while they were in foster care is an operational function for which there is a waiver of sovereign immunity. In *Department of Health & Rehabilitative Services v. Yamuni*, the Supreme Court held that "the HRS child abuse role is to provide professional, educational, and general services for the health and welfare of its citizens. These activities fall within category IV of *Tranon* for which there is a waiver of immunity and a duty of care." *Dep't of Health & Rehab. Servs. v. Yamuni*, 529 So. 2d 258, 261 (Fla. 1988).

The Florida Supreme Court has recognized that “all governmental functions, no matter how seemingly ministerial, can be characterized as embracing the exercise of some discretion in the manner of their performance” and therefore found that although caseworkers “exercised discretion in the dictionary or English sense of the word, . . . **discretion in the *Commercial Carrier* sense refers to discretion at the policy making or planning level.**” *Yamuni*, 529 So. 2d at 260 (emphasis added). The Court has held that the functions of making placement decisions and choosing which services to implement in a case plan are discretionary in nature and subject to sovereign immunity. *Dep’t of Health & Rehab. Servs. v. B.J.M.*, 656 So. 2d 906, 913 (Fla. 1995).

However, on the other hand, the Florida Supreme Court has determined that both placing a child in a known dangerous environment and negligently failing “to adequately protect a child from further . . . abuse” are operational functions. *B.J.M.*, 656 So. 2d at 913 (citing *Dep’t of Health & Rehab. Servs. v. Whaley*, 574 So. 2d 100, 101 (Fla. 1991); *Yamuni*, 529 So. 2d at 260)). In *B.J.M.*, the Court explicitly stated that “as evidenced by [its] decisions in *Whaley* and *Yamuni*, [it] will not hesitate to subject an agency to tort liability when its negligently conducted operational level activities expose children to specific foreseeable dangers that result in physical injuries to children. *Id.* at 914. In this case, the Defendant’s actions and omissions in failing to protect the minor children from further harm while in foster care and failing to disclose their significant abuse history to their adoptive parents in order for them to make a fully informed decision about adoption is the precise type of acts and/or omissions that *Yamuni* and its progeny have held is a non-discretionary function that subjects a state agency to tort liability.

5. Defendant’s Third and Fourth Affirmative Defenses should be stricken as legally insufficient insomuch as they constitute legal conclusions with no factual allegations to support

the assertion that “[p]ursuant to section 39.011(1), Florida Statutes, FSSNF is not liable for any of the claims asserted in this lawsuit as any failure to provide services by FSSNF did not occur as a result of bad faith or malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property” and “[p]ursuant to section 39.011(2), Florida Statutes, FSSNF is not liable for any of the claims asserted in this lawsuit as any inability or failure of FSSNF to provide services do not occur in a manner exhibiting wanton or willful disregard of human rights, safety, or property.”

Furthermore, the immunities provided under chapter 39 are inapplicable to this negligence complaint against this Defendant. Under chapter 39, employees or agents of the department or a social service agency acting in good faith are not liable for damages as a result of failing to provide services agreed to under the case plan unless the failure to provide such services occurs as a result of bad faith or malicious purpose or occurs in a manner exhibiting wanton and willful disregard of human rights, safety, or property. *See Fla. Stat. § 39.011 (2006)*. Plaintiffs allege that the Defendant failed to provide the minor Plaintiffs with, *inter alia*, a reasonable and safety placement, appropriate monitoring and supervision, protection from harm, reasonable and reasonable and safe continuity of care therapy, and case monitoring. *See Exhibit “A,” ¶ 128*. Plaintiffs further alleged that the Defendant failed to fully and completely disclose and fully investigate the history of the minor Plaintiffs to ensure disclosure of all information and records it had concerning the minor Plaintiffs past significant history of abuse and neglect and failed to fully investigate, misrepresented, and/or deliberately concealed material facts regarding the minor Plaintiffs history of trauma and serious behavioral needs while knowing that the adoptive parents would rely on said misrepresentations in making their decision to adopt the minor Plaintiffs. *See Exhibit “A,” ¶¶ 133–37*. As this does not involve failure to provide

services under the case plan, no immunity under section 39.011, Florida Statutes, is available to this Defendant.

6. Defendant's Fifth Affirmative Defense should be stricken as legally insufficient inasmuch as it constitutes a legal conclusion with no factual allegations to support the assertion that the Defendant "[p]ursuant to section 39.203(1)(a), Florida Statutes, FSSNF is not liable for any of the claims asserted in this lawsuit for all the claims alleged against it in this lawsuit arise in FSSNF's participation in good faith in acts authorized or required by Chapter 39."

Section 39.203 provides that "[a]ny person, official, or institution participating in good faith in any act authorized or required by this chapter . . . shall be immune from any civil or criminal liability which might otherwise result by reason of such action." *Id.* § 39.203(1)(a). However, the purpose of chapter 39 is "[t]o provide for the care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development; to ensure secure and safe custody; to promote the health and well-being of children under the state's care; and *to prevent the occurrence of child abuse, neglect, and abandonment.*" *Id.* § 39.001(1)(a) (emphasis added). The legislative intent behind chapter 39 is to ensure that "policies and procedures that provide for prevention and intervention through the department's child protection system [are] based on the . . . principle that [t]he *health and safety of the children served shall be of paramount concern.*" *Id.* § 39.001(1)(b) (emphasis added). The Legislature further declared that its purpose is "that the children of this state be provided with . . . *[p]rotection from abuse*; . . . [and a] safe and nurturing environment which will preserve a sense of personal dignity and integrity." *Id.* § 39.001(3)(a), (c) (emphasis added).

In *Yamuni*, the Florida Supreme Court analyzed Florida's child protection statutory scheme and found that "[i]t is clear from these various provisions of law that the

primary duty of HRS is to immediately prevent any further harm to the child.” *Yamuni*, 529 So. 2d at 261. The Court found that children are a protected class and that HRS was charged with the statutory duty of protecting them from further harm. *Id.* at 262. In so finding, the Court further held that while the immunity statute in place at the time “protect[ed] against liability for carrying out the protective measures of chapter 827 on behalf of the protected class, it [did] not protect against failing to carry out the protective measures.” *Id.* at 262.

In the instant case, according to the various provisions of chapter 39 outlined above, the Defendant played an active role in the child protection system as the lead community-based agency in Duval and/or Nassau Counties contracted to perform foster care and related services. As such, the Defendant had a statutory duty to protect children, including the Plaintiffs, from further harm. Plaintiffs have alleged that the Defendant repeatedly failed to protect the minor Plaintiffs by failing to get them assessed, evaluated, or treated with respect to the abuse and neglect they suffered in the Smith home, failing to determine if they had special needs which would need to be addressed in any potential adoptive placement, continuing to search out regular adoptive placements for the minor Plaintiffs while representing that the minor Plaintiffs had no special needs, failing to get them assessed, evaluated or treated with respect to their numerous failed placements, and failing to disclose any of the minor Plaintiffs’ abuse history and serious behavioral needs to their ultimate adoptive parents which resulted in harm to the Plaintiffs.

Based on the foregoing, immunity under section 39.203 is unavailable to the Defendant. The predecessor statute to section 39.203 was section 415.511, which had virtually identical language. *See Fla. Stat.* § 415.511(1)(a) (1997). Case law clearly states that the intention of section 415.511(1)(a) was “to protect those who might be overzealous in protecting children from potential abuse; it was not intended to protect those who fail to fulfill their duty to

protect children.” *Floyd v. Dept of Children & Families*, 855 So. 2d 204, 206 (Fla. 1st DCA 2003). Therefore, because the Defendant failed to fulfill its statutory duty to protect the Plaintiffs from further harm, it is not entitled to statutory immunity under section 39.203.

7. Defendant’s Sixth Affirmative Defense should be stricken as legally insufficient inasmuch as it makes a legal conclusion that:

FSSN is the lead community based provider in Duval County and Nassau County, Florida. Pursuant to Section 409.1671(h): “The lead community-based provider shall not be liable in tort for the acts or omissions of its subcontractors or the officers, agents, or employees of its subcontractors.” Thus, FSSNF cannot be held liable for the acts or omissions of BHA, or any of its other subcontractors or the officers, agents, or employees of any of its subcontractors.

Plaintiffs’ First Amended Complaint is replete with allegations directly against the Defendant. As a lead community-based provider, the Defendant was required to comply with Chapter 39 and section 409.1671, Florida Statutes. Chapter 39 governs the child welfare system in the State of Florida. The purpose of Chapter 39 is “[t]o provide for the care, safety, and protection of children; . . . to ensure secure and safe custody; to promote the health and well-being of all children under the state's care; and to prevent the occurrence of child abuse, neglect and abandonment.” *Fla. Stat.* § 39.001(1)(a). The legislature has found that “[t]he health and safety of children served shall be of paramount concern” and a purpose of the Legislature is “that the children of this state be provided with . . . protection from abuse, abandonment, neglect, and exploitation [and] a safe and nurturing environment.” *Id.* § 39.001(1)(b)(1), (3)(a), (c).

Section 409.1671 states that “[t]he legislature has determined that foster care and related services need to be outsourced pursuant to this section and that the provision of such services is of paramount importance to the state. The purpose for such outsourcing is to increase

the level of safety, security, and stability of children who are or become the responsibility of the state.” *Fla. Stat.* 409.1671(1)(f). Section 409.1671 states that “[t]he community-based agency [such as the Defendant] must comply with statutory requirements and agency rules in the provision of contractual services.” *Id.* § 409.1671(5)(a).

Plaintiffs’ First Amended Complaint alleges, *inter alia*, “[a]t all times relevant hereto, FSSNF was the lead agency for coordination and delivery of community-based foster care, adoption, and related services in Duval County, Florida and/or Nassau County, Florida, pursuant to § 409.1671, Florida Statutes, and operated under a contract with DCF to provide such services to children in the custody of DCF, including J.D. and W.D.” *See* Exhibit “A,” ¶ 11. As such, pursuant to section 409.1671 and the Defendant’s contract with DCF, as a lead community based care provider, the Defendant had a duty to comply with Chapter 39 while providing protective supervision and adoption services to the Plaintiffs.

Furthermore, section 409.1671(1)(e) states that in order to compete for an outsourcing project, an “eligible lead community-based provider” must have, *inter alia*:

1. The ability to coordinate, integrate, and manage all child protective services in the designated community in cooperation with child protective investigations.
2. The ability to ensure continuity of care from entry to exit for all children referred from the protective investigation and court systems.
3. The ability to provide directly, or contract for through a local network of providers, all necessary child protective services. Such agencies should directly provide no more than 35 percent of all child protective services provided.
4. The willingness to accept accountability for meeting the outcomes and performance standards related to child protective services established by the Legislature and the Federal Government.

5. The capability and the willingness to serve all children referred to it from the protective investigation and court systems, regardless of the level of funding allocated to the community by the state, provided all related funding is transferred.
6. The willingness to ensure that each individual who provides child protective services completes the training required of child protective service workers by the Department of Children and Family Services.
7. The ability to maintain eligibility to receive all federal child welfare funds, including Title IV-E and IV-A funds, currently being used by the Department of Children and Family Services.

*Fla. Stat.* § 409.1671(1)(e). Therefore, in order for the Defendant to become a lead community-based agency, it was required to agree to the above statutory provisions.

Finally, the statute requires lead community-based agencies such as the Defendant to carry minimum levels of insurance of 1 million per claim/ \$3 million per incident in general liability insurance coverage in order to give foster children the right to recover for injuries beyond the limitations specified in s. 788.28. *Id.* § 409.1671(1)(f), (h).

Plaintiffs' First Amended Complaint alleges, *inter alia*:

24. In or about September 2007, FSSNF became the lead agency for community-based foster care, adoption, and related services in Nassau County, and thus assumed responsibility for J.S.'s and W.D.'s care.

25. Upon information and belief, FSSNF received all information regarding the children's case history, including the abuse suffered in the Smith home and the children's serious behavioral needs, especially W.D.

26. Additionally, immediately upon assuming responsibility for the children's care, FSSNF received numerous reports directly from Kathy regarding W.D.'s aggression and tantrums, including that she felt he might need to be tested for



delays and attention deficits, and repeatedly received respite care for him as a result of the level of care he required.

27. However, FSSNF failed to seek and/or obtain any evaluations, treatment, or services to address the children's trauma and related behavioral issues.

28. Instead, FSSNF actively sought a non-special needs adoptive placement for J.D. and W.D. without taking any steps to ensure their behaviors would not disrupt future placements.

32. Upon information and belief, FSSNF did not disclose any of the children's abuse history or their serious behavioral needs to the Taylor family prior to placement.

34. As a result, the prospective adoptive placement with the Taylor family failed after five (5) months).

36. ... the children went through two more foster home placements, one of which resulted in additional physical abuse, and where the children again displayed emotional and behavioral deterioration.

37. Despite this, FSSNF continuously failed to seek and/or obtain necessary evaluations, treatment, or services to address the children's serious needs.

40. Plaintiffs, A.D. and S.T. did not want to adopt special needs children and were not prepared to deal with the children's behavioral needs.

41. FSSNF failed to disclose any of the children's abuse history or their serious behavioral needs to Plaintiffs, A.D. and S.T, prior to placement for adoption.

Paragraphs seventy-nine through one hundred twenty-two go on to specifically relate solely to the Defendant's negligence with respect to "FSSNF's Failure to Protect J.D. and W.D." and "FSSNF's Failure to Disclose the Children's Trauma and Serious Needs." Finally, Count II and III of Plaintiffs' First Amended Complaint allege specific duties that the Defendant owed the Plaintiffs directly, Defendant's breaches of those duties, and damages suffered as a result of those breaches

Based on the foregoing, the Defendant had a statutory and contractual duty to ensure the minor Plaintiffs' health, safety, and welfare while they were in the care and custody of the State, and to disclose all known facts about the minor Plaintiffs' significant history of abuse and neglect to their adoptive parents prior to adoption. The Plaintiff have sufficiently alleged breaches of duty against the Defendant for which it is directly liable. While section 409.1671(h), Florida Statutes, does state that "the lead community-based provider shall not be liable in tort for the acts or omissions of its subcontractors or the officers, agents, or employees of its subcontractors," Plaintiffs' First Amended Complaint alleges tortious acts or omissions directly on the part of the Defendant. Based on the foregoing, the Defendant's Sixth Affirmative Defense should be stricken.

8. Defendant's Eleventh Affirmative Defense should be stricken as legally insufficient inasmuch as the Defendant makes the legal conclusion that "[a]ll conditions precedent to the bringing of this action have not occurred, been performed, or been waived. Specifically, the notice provisions of the waiver of the sovereign immunity statute, Section 768.28, Florida Statutes, have not been complied with respect to FSSNF." While a claim that a condition precedent has been met may be averred generally, a claim that a condition precedent has not been complied with must be stated "specifically and with particularity." Fla. R. Civ. P. 1.120(c). The Defendant has not stated with any specificity or particularity how it would be entitled to pre-suit notice. For the reasons set forth in paragraph four, the Defendant is not an agent of the state and is therefore not entitled to the protections of § 768.28, including pre-suit notice.

9. Defendant's Twelfth Affirmative Defense should be stricken as legally insufficient inasmuch as it is a legal conclusion with no factual allegations and is a mere denial

that the Defendant was negligent which Defendant has already set forth in its Answer. *See* Exhibit “B” ¶¶127–138. Said affirmative defense states “Plaintiffs’ [sic] were given complete disclosure of the children’s physical, medical, and mental health records during pre-adoptive placement and during the adoption presentation, in accordance with Florida Administrative Code 65C-16.002(7)(a-c) and (8).”

This statement is just a denial of negligence and does not constitute an affirmative defense. According to Florida Rule of Civil Procedure 1.110(c), in its answer, a pleader shall state in short and plain terms the pleaders defenses to each claim and shall admit or deny the averments on which the adverse party relies. A party must affirmatively set forth any matter constituting an avoidance or an affirmative defense. Fla. R. Civ. P. 1.110(d). “An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability.” *St. Paul Mercury Ins. Co. v. Couchner*, 837 So. 2d 483, 487 (Fla. 5th DCA 2002). Because this is not a proper affirmative defense, but instead is merely denial of negligence, this affirmative defense should be stricken.

10. Defendant’s Thirteenth Affirmative Defense should be stricken as legally insufficient insomuch as the Defendant makes the legal conclusion that “Plaintiffs’ actions in declining any services to address the children’s behaviors during the adoption process and while the adoption was finalized have resulted in a waiver of Plaintiff’s claims.” In pleading an affirmative defense, all of the elements of that defense must be alleged or the defense is legally insufficient. *Am. Nat. Growers Corp. v. Harris*, 120 So. 2d 212 (Fla. 2d DCA 1960). Certainty is required in pleading defenses and claims alike. *Cady v. Chevy Chase Savings & Loan, Inc.*, 528 So. 2d 136, 138 (Fla. 4th DCA 1988). Pleading conclusions of law unsupported by

allegations of ultimate fact does not suffice. *Id.* (citing *Bliss v. Carmona*, 418 So. 2d 1017 (Fla. 3d DCA 1982)). Defendant cites to no facts which support that the Plaintiffs were offered any services prior to or during the adoption process, nor does the Defendant state what those alleged services were, or when they were allegedly refused by the Plaintiffs. Plaintiffs have alleged, *inter alia*:

40. Plaintiffs, A.D. and S.T., did not want to adopt special needs children and were not prepared to deal with the children's behavioral needs.

41. FSSFN failed to disclose any of the children's abuse history or their serious behavioral needs to Plaintiffs, A.D. and S.T., prior to placement for adoption.

44. Since Plaintiffs, A.D. and S.T. adopted J.D. and W.D., the children have exhibited numerous behavioral issues and/or health and safety concerns ... .

As such, Plaintiffs have alleged that the Defendant failed to disclose the severe abuse and neglect the minor Plaintiffs suffered while in foster care and the Plaintiffs were unaware of the minor Plaintiffs significant behavioral issues prior to the adoption being finalized. The Defendant therefore cannot reasonably claim that the Plaintiffs declined services to address behaviors they didn't know about previously and that this results in a waiver of Plaintiffs' claims. Based on the foregoing, the Defendant's thirteenth affirmative defense should be stricken.

11. Defendant's Fourteenth Affirmative Defense should be stricken as legally insufficient inasmuch in that the Defendant makes the conclusory statement that "Plaintiffs are receiving an enhanced adoption subsidy to provide additional financial assistance for therapeutic services and as such are stopped from asserting the instant claims." A defendant must specifically allege all the elements of estoppel when raising it as an affirmative defense. *Dep't of*

*Revenue v. Hobbs*, 368 So. 2d 367, 368 (Fla. 1st DCA 1979). The elements of estoppel are: (1) a representation by the party to be stopped to the party claiming estoppel as to some material fact which is contrary to the position later asserted by the estopped party; (2) a reasonable reliance on the present representation by the party claiming estoppel; and (3) a detrimental change in position by the party claiming estoppel caused by the representation and the reliance thereon. *Mobile Medical Industries v. Quinn*, 985 So. 2d 33 (Fla. 1st DCA 2008). The Defendant did not allege a single element of estoppel but rather made a conclusory general statement that the Plaintiffs are estopped from asserting their claims. The Defendant has not alleged that the Plaintiffs made any representation to the Defendant contrary to their current position, that the Defendant reasonably relied on Plaintiffs' representation, or that the Defendant had a detrimental change in position caused by relying on Plaintiffs' representation. As such, this defense is legally insufficient and should be stricken.

12. Defendant's Fifteenth Affirmative Defense should be stricken as legally insufficient inasmuch as the Defendant makes the legal conclusion that "Plaintiffs cannot maintain their claims for damages, including treatment, support and services expenses, because they have failed to exhaust the administrative remedies available to them before initiating their claims." As set forth above, certainty is required in pleading defenses and claims alike. *Cady v. Chevy Chase Savings & Loan, Inc.*, 528 So. 2d 136, 138 (Fla. 4th DCA 1988). Pleading conclusions of law unsupported by allegations of ultimate fact does not suffice. *Id.* (citing *Bliss v. Carmona*, 418 So. 2d 1017 (Fla. 3d DCA 1982)). Defendant cites to no facts which support what administrative remedies were available to the Plaintiffs or how Plaintiffs failed to exhaust them. As such, this defense should be stricken as legally insufficient.

13. The Defendant's Sixteenth Affirmative Defense should be stricken as legally insufficient inasmuch as the "[p]ursuant to Florida Rule of Civil Procedure 1.130(b) FSSNF hereby incorporates, as if fully set forth herein, each and every affirmative defense asserted by every other defendant in this action." This is wholly improper and is not a valid affirmative defense. "An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability." *St. Paul Mercury Ins. Co. v. Couchner*, 837 So. 2d 483, 487 (Fla. 5th DCA 2002). This defense clearly does not meet this criteria. The various defendants in this action had different roles with respect to the minor Plaintiffs and Plaintiffs have asserted individual causes of action against each defendant. The defenses that may apply to one defendant based on a distinct set of circumstances may not apply to this Defendant as this Defendant's role was with respect to the provision of case management and adoption services after their removal from the Smith home and the Defendant's failure to adequately assess the minor Plaintiffs and disclose their severe behavioral issues related to the abuse and neglect they suffered in the [REDACTED] home to their adoptive parents. As such, this is not a proper affirmative defense and should be stricken.

WHEREFORE, for the reasons set forth above, Plaintiffs respectfully request that this Honorable Court grant Plaintiffs' Motion to Strike Defendant, FAMILY SUPPORT SERVICES OF NORTH FLORIDA, INC.'S First, Third through Sixth, and Eleventh through Sixteenth Affirmative Defenses.

#### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been provided by electronic delivery to: Courtney K. Grimm, Esquire and R.H. Farnell, II, Esquire, Bedell, Dittmar, et al., [cgrimm@bedellfirm.com](mailto:cgrimm@bedellfirm.com), [rhf@bedellfirm.com](mailto:rhf@bedellfirm.com), [mmoon@bedellfirm.com](mailto:mmoon@bedellfirm.com),

Attorneys for Defendant, FSSNF; Dennis O'Connor, Esquire and Matthew J. Haftel, Esquire, O'Connor & O'Connor, LLC, [mhaftel@oconlaw.com](mailto:mhaftel@oconlaw.com), [mwilliams@oconlaw.com](mailto:mwilliams@oconlaw.com) and [mramsey@oconlaw.com](mailto:mramsey@oconlaw.com), Attorneys for Defendant, FSSNF, and to David A. Cornell, Esquire, Cole, Scott & Kissane, P.A., [david.cornell@csklegal.com](mailto:david.cornell@csklegal.com) and [tara.alcantara@csklegal.com](mailto:tara.alcantara@csklegal.com), Attorneys for Defendant, Boys' Home Association, this 15th day of November, 2012.

COLODNY, FASS, TALENFELD, KARLINSKY,  
ABATE & WEBB, P.A.

Attorneys for Plaintiffs

One Financial Plaza - 23rd Floor

100 S.E. Third Avenue

Fort Lauderdale, Florida 33394

Telephone: 954 492-4010

Facsimile: 954 492-1144

By: \_\_\_\_\_



Joel S. Fass

Fla. Bar #213233

[jfass@cftlaw.com](mailto:jfass@cftlaw.com)

[sschmerling@cftlaw.com](mailto:sschmerling@cftlaw.com)

[sgilbert@cftlaw.com](mailto:sgilbert@cftlaw.com)

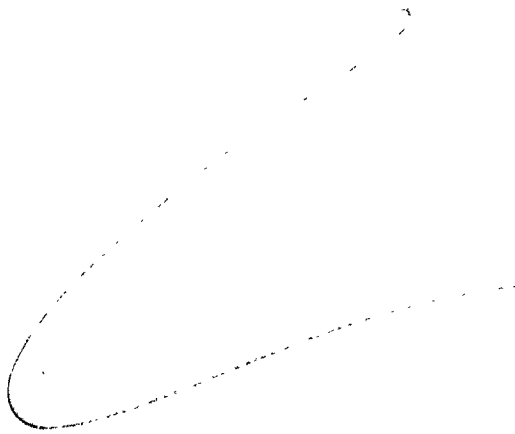


EXHIBIT "A"

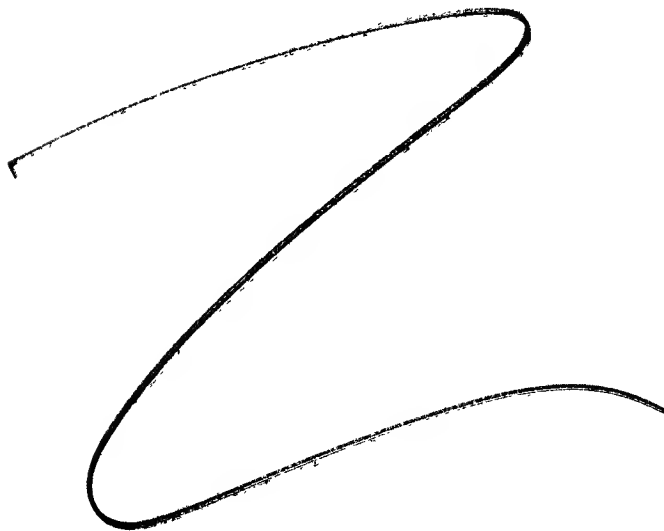


EXHIBIT "A"



JSF

IN THE CIRCUIT COURT OF THE 4th  
JUDICIAL CIRCUIT IN AND FOR  
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2011-CA-002567-XXXX-MA

A.D. and S.T, individually and on behalf :  
of their adopted children, J.D. and W.D., :

Plaintiffs, :

vs. :

FAMILY SUPPORT SERVICES OF :  
NORTH FLORIDA, INC., a Florida :  
corporation, and BOYS' HOME :  
ASSOCIATION, INC., a Florida :  
corporation, :

Defendants. :

**FIRST AMENDED COMPLAINT**

Plaintiffs, A.D. and S.T. individually and on behalf of their adopted children, J.D. and W.D.,  
by and through undersigned counsel, hereby sue the Defendants, FAMILY SUPPORT SERVICES  
OF NORTH FLORIDA, INC., a Florida corporation, and BOYS' HOME ASSOCIATION, INC., a  
Florida corporation, and state as follows:

**JURISDICTION AND VENUE**

1. This is a claim for negligence for actions which took place in Duval County, Florida  
and Nassau County, Florida.

2. This action involves damages in excess of Fifteen Thousand Dollars (\$15,000.00)  
exclusive of attorney's fees, interests or costs.

**THE PARTIES**

3. Plaintiffs, A.D, and S.T., are *sui juris* adults who adopted J.D. and W.D. as their

children.

4. Plaintiff, J.D., whose date of birth is November 12, 2002, is a minor child.

5. Plaintiff, W.D., whose date of birth is August 13, 2004, is a minor child.

6. J.D. and W.D., were legally dependent children pursuant to Chapter 39, Florida Statutes, and in the legal and physical custody of the Department of Children and Families (hereinafter "DCF").

7. On August 19, 2009, Plaintiffs, A.D. and S.T., legally adopted J.D. and W.D. pursuant to a Final Judgment of Adoption entered by the Circuit Court in and for the Fourth Judicial Circuit.

8. Due to J.D. and W.D.'s status as minor children, they are filing this action through their next friends and adoptive parents, A.D. and S.T.

9. Due to the nature of the allegations contained herein, the parties have filed this action using pseudonyms.

10. Defendant, FAMILY SUPPORT SERVICES OF NORTH FLORIDA, INC. (hereinafter "FSSNF"), is a not-for-profit corporation, organized and existing under the laws of the State of Florida, and operating its business in Duval County, Florida and Nassau County, Florida.

11. At all times relevant hereto, FSSNF was the lead agency for coordination and delivery of community-based foster care, adoption, and related services in Duval County, Florida and/or Nassau County, Florida pursuant to § 409.1671, Florida Statutes, and operated under a contract with DCF to provide such services to children in the custody of DCF, including J.D. and W.D.

12. Defendant, BOYS' HOME ASSOCIATION, INC. (hereinafter "BHA"), is a not-for-profit corporation, organized and existing under the laws of the State of Florida, and operating its

business in Duval County, Florida.

13. At all times relevant hereto, BHA was a licensed child-placing agency, authorized by DCF to conduct licensing studies of family foster homes and to certify to DCF that the home met its licensing requirements.

### **GENERAL ALLEGATIONS**

14. On or about March 24, 2005, J.D., then two years of age, and W.D., then seven months of age, were removed from their biological mother in Nassau County, Florida, because of her inability to provide stable housing and care for the children.

15. At the time of removal, the children's case was managed by Family Matters of Nassau County (hereinafter "FMNC"), a department of Nassau County which was then acting as the lead agency which had contracted with DCF to provide community-based foster care and related services.

16. On March 24, 2005, FMNC placed the children in the licensed foster home of Annette Smith f/k/a Annette Ross (hereinafter [REDACTED] or "[REDACTED] home").

17. The Smith home was licensed by BHA in 2004, who knew or should have known that Ms. Smith had a criminal history of abuse of her biological children and that she lied about this fact during the application process, which would have disqualified her from initial licensure as a foster parent.

18. Despite receiving several abuse reports after licensing [REDACTED] BHA continued to license the Smith home for two (2) years.

19. The children were removed from the Smith home on October 6, 2006 as a result of verified abuse allegations.

20. FMNC then placed the children in the foster home of [REDACTED] (hereinafter

"Kathy").

21. Although FMNC did not disclose to Kathy that the children were removed from the Smith home due to serious abuse allegations, it became apparent to her that J.D. and W.D. had been severely traumatized as a result of their behaviors.

22. Specifically, Kathy reported that J.D. started using baby talk and would flinch at any quick movements, and that W.D. would have unprovoked screaming fits for up to thirty (30) minutes at a time, periodically wet his bed at night, and was frequently physically aggressive.

23. However, J.D., now nearly four years of age, and W.D., just over two years of age, did not receive any evaluations, treatment, or services for the abuse they suffered while under FMNC's care.

24. In or about September 2007, FSSNF became the lead agency for community-based foster care, adoption, and related services in Nassau County, and thus assumed responsibility for J.D.'s and W.D.'s care.

25. Upon information and belief, FSSNF received all information regarding the children's case history, including the abuse suffered in the [REDACTED] home and the children's serious behavioral needs, especially W.D.

26. Additionally, immediately upon assuming responsibility for the children's care, FSSNF received numerous reports directly from Kathy regarding W.D.'s aggression and tantrums, including that she felt he might need to be tested for delays and attention deficits, and repeatedly received respite care for him as a result of the level of care he required.

27. However, FSSNF failed to seek and/or obtain any evaluations, treatment, or services to address the children's trauma and related behavioral issues.

28. Instead, FSSNF actively sought a non-special needs adoptive placement for J.D. and W.D. without taking any steps to ensure their behaviors would not disrupt future placements.

29. Kathy expressed her desire to adopt the children as well as her serious concerns about the effect that any placement move would have on the children and W.D.'s behavior without proper supports.

30. Despite this, FSSNF placed J.D. and W.D. with another potential adoptive family (hereinafter "[REDACTED]") out of state in Virginia in April 2008.

31. At that time, Kathy informed FSSNF that she still wanted to care for and adopt the children should the adoptive placement in Virginia fail.

32. Upon information and belief, FSSNF did not disclose any of the children's abuse history or their serious behavioral needs to the [REDACTED] family prior to placement.

33. The [REDACTED] family did not want to adopt special needs children and were not prepared to deal with the children's behavioral needs.

34. As a result, the prospective adoptive placement with the [REDACTED] family failed after five (5) months.

35. Upon returning from Virginia in September 2008, FSSNF did not place J.D. and W.D. back in the [REDACTED] home for adoption.

36. Rather, the children went through two more foster home placements, one of which resulted in additional physical abuse, and where the children again displayed emotional and behavioral deterioration.

37. Despite this, FSSNF continuously failed to seek and/or obtain necessary evaluations, treatment, or services to address the children's serious needs.

38. Once again, [REDACTED] expressed her desire to adopt the children and made a formal application for adoption.

39. However, without regard to the children's prior emotional attachment with Kathy and her well established ability to address the children's special needs, FSSNF identified Plaintiffs, A.D. and S.T., as potential adoptive parents in Canada in December 2008.

40. Plaintiffs, A.D. and S.T., did not want to adopt special needs children and were not prepared to deal with the children's behavioral needs.

41. FSSNF failed to disclose any of the children's abuse history or their serious behavioral needs to Plaintiffs, A.D. and S.T., prior to placement or adoption.

42. On April 30, 2009, J.D. and W.D. were transported to the prospective adoptive home of A.D. and S.T., in Victoria, British Columbia.

43. On August 19, 2009, J.D. and W.D. were officially adopted by Plaintiffs, A.D. and S.T., through the Florida court system.

44. Since Plaintiffs, A.D. and S.T., adopted J.D. and W.D., the children have exhibited numerous behavioral issues and/or health and safety concerns including:

- a. W.D. has angry outbursts such as throwing books at the nanny and punching her in the face;
- b. W.D. has inappropriately touched J.D. and is constantly in need of guidance as to physical boundaries;
- c. W.D. has gender identity problems in that he did not know whether he was a boy or a girl;
- d. J.D. continues to have nightmares about monsters whom she reports are Ms. Smith;
- e. J.D. constantly expresses a desire to kill her adoptive mother and her brother and chop them up into pieces; and

f. J.D. defecates on her hands and smears it on her adoptive mother.

45. Both J.D. and W.D. suffer with serious psychological and psychiatric needs requiring a lifetime of extensive treatment.

#### **BHA's Licensing of Smith Home**

46. On October 21, 2004, [REDACTED] submitted an application to BHA to become a licensed foster parent.

47. Although [REDACTED] did not specifically indicate that she was formerly known by her married name, [REDACTED], she did disclose on the application that she was previously married and provided her former husband's name as well as the name of one of her biological children.

48. During the home study process, [REDACTED] further claimed that she was the victim of domestic violence in her marriage, and that the one biological child living with her was home schooled.

49. Despite having this information, BHA failed to conduct an appropriate background screening, including criminal and abuse records history, on [REDACTED] married name, the name of her former husband, and the name of all of her biological children.

50. Had BHA conducted an appropriate background screening, it would have learned that [REDACTED] had her biological children removed from her custody in 1991 as a result of verified allegations of abuse, which also resulted in criminal abuse charges.

51. BHA also would have discovered additional abuse allegations against [REDACTED] with regard to her biological children in 2001 and 2002, and that two of her biological children resided with their father as a result.

52. Upon information and belief, BHA failed to obtain written references from non-

relatives and failed to investigate the validity of [REDACTED]'s claim that she home-schooled her biological child.

53. As a result of BHA's failure to screen N [REDACTED] for this otherwise disqualifying information, BHA licensed Annette Smith to foster up to four (4) children on December 6, 2004.

54. On or about April 6, 2005, just four (4) months after initial licensure and less than two (2) weeks after J.D. and W.D. were placed in the [REDACTED] home, two other foster children were removed from the [REDACTED] home as a result of abuse allegations and placed in another foster home.

55. On or about April 16, 2005, the new foster mother reported to BHA that the children's clothes were odorous, and that she observed one of the children take all of the clothes off her dolls and beat them. When the new foster mother asked why the child was beating the babies, she disclosed that it was what [REDACTED] had done to them.

56. Despite these serious allegations and findings of some indicators in the abuse investigation, BHA continued to license the [REDACTED] home.

57. In October 2005, [REDACTED] applied for re-licensure of her foster home.

58. BHA again failed to conduct an appropriate background screening.

59. However, unlike the initial licensure, on October 26, 2005, BHA did receive results on the Central Abuse Hotline Record Search that indicated the prior abuse reports involving [REDACTED] biological children.

60. Therefore, no later October 26, 2005, BHA had either actual or constructive knowledge that [REDACTED] had a criminal abuse history and had lied about these facts during her initial application for licensure in 2004, yet ignored this disqualifying information.

61. Additionally, BHA's licensing workers failed to conduct the statutorily required



review of abuse reports for the prior licensing year.

62. During the re-licensure process, [REDACTED] gave a false account as to the reason two children were removed from her home in April 2005, claiming it was the result of issues with the biological mother rather than as a result of an abuse report.

63. As a result of BHA's licensing workers' failure to review the prior year's abuse reports or even BHA's own licensing file, BHA's employees failed to uncover that [REDACTED] lied about the April 2005 abuse report and failed to take that report and the subsequent allegations into consideration during the re-licensing process.

64. BHA either knew or should have known of Ms. Smith's criminal abuse history and that Ms. Smith lied during the re-licensure process, both of which should have disqualified her from obtaining a license to foster children.

65. However, on December 6, 2005, BHA relicensed the [REDACTED] home to care for two (2) foster children.

66. On or about January 11, 2006, BHA increased the licensing capacity of the [REDACTED] home to four (4) children.

67. In April 2006, there was another abuse report, alleging physical abuse of a foster child in the [REDACTED] home.

68. On or about May 20, 2006, with the [REDACTED] home already at licensed capacity of four (4) children, BHA placed an additional two (2) foster children in the [REDACTED] home, bringing the total number of children in the home to seven (7), including [REDACTED]'s biological child.

69. Upon information and belief and contrary to statutory and DCF operating procedure requirements, BHA failed to conduct the required assessments or receive appropriate approval for

placement of six (6) foster children in the [REDACTED] home.

70. In June 2006, there was another abuse report against [REDACTED] this time alleging physical abuse of [REDACTED] biological child.

71. Because the June 2006 abuse investigation involved [REDACTED]'s biological child, the investigator's search of prior abuse reports revealed [REDACTED]'s abuse of her biological children from 1991, as well as the additional reports of 2001 and 2002.

72. Upon information and belief, DCF provided these abuse investigation reports to BHA.

73. However, BHA took no action and continued to license the [REDACTED] foster home.

74. On October 6, 2006, there was another abuse report against [REDACTED] alleging physical abuse of a foster child.

75. During the course of the investigation, all six (6) of the foster children then in the [REDACTED] home, including Plaintiffs, disclosed severe physical and emotional abuse and neglect.

76. The investigation verified the abuse allegations, and as a result, all of the children, including J.D. and W.D., were removed from the Smith home.

77. Additionally, on or about October 17, 2006, BHA revoked [REDACTED] foster care license as a result of the verified abuse.

78. In or about November 2006, [REDACTED] was arrested and charged in a two count information with criminal child abuse and contributing to the delinquency of a minor. In January, 2007, [REDACTED] negotiated a plea to the charge of contributing to the delinquency of a minor for which she was adjudicated.

**FSSNF's Failure to Protect J.D. and W.D.**

79. At the time that FSSNF assumed responsibility for J.D. and W.D.'s care in or about

September 2007, the children had been in the foster home of Kathy Smith since October 2006.

80. Upon information and belief, FSSNF received all information regarding the children's case history, including the abuse suffered in the [REDACTED] home and the children's serious behavioral needs, especially W.D.

81. At FSSNF's first home visit on September 17, 2007, Kathy informed Defendant that W.D. periodically wet himself during the night, that he was much to care for, and that she was in need of respite.

82. Kathy again needed respite care for W.D. due to his behavior on November 14, 2007, and also informed FSSNF that W.D. had recently started spitting at people and that she felt he might need to be tested for medications to calm him down.

83. The FSSNF case manager made a referral for services to the Early Steps Program, but upon information and belief, no services were ever obtained.

84. In January 2008, Kathy again expressed her serious concerns regarding W.D.'s behavior, but no services were sought or obtained.

85. In March 2008, an FSSNF case worker directly observed W.D. acting out during her home visit, but no services were sought or obtained.

86. On or about April 10, 2008, J.D. and W.D. were transported to the prospective adoptive home of the [REDACTED] family in Virginia.

87. The [REDACTED] family also reported W.D.'s tantrums, screaming, and aggressive behaviors, as well as J.D.'s conflicts with their biological daughter and slowness to attach.

88. On August 13, 2008, the [REDACTED] family informed FSSNF's case manager that they did not want to proceed with adoption as a result of the children's needs.

89. FSSNF knew that J.D. and W.D. would need therapy and counseling to deal with this third placement disruption and failed adoption, because the case manager requested it; however, no such therapy was obtained or provided.

90. Instead, the children were told that they were returning to Florida for a visit only and upon their arrival on September 15, 2008, the prospective adoptive parents said goodbye and never returned.

91. FSSNF then placed J.D. and W.D. in their fourth placement, the [REDACTED] foster home in Callahan, Florida.

92. Once again, FSSNF was informed that W.D.'s behavior was erratic and aggressive, but Defendant failed to obtain necessary services.

93. Further, FSSNF failed to conduct any of the statutorily required home visits for the three (3) months the children were in the [REDACTED] foster home.

94. On or about December 5, 2008, an abuse investigation revealed that J.D. and W.D. were being physically abused in the [REDACTED] foster home.

95. On December 9, 2008, FSSNF removed the children, who were now ages four and six, and placed them in a fifth foster home in Callahan, Florida.

96. On December 18, 2008, the children's pediatrician informed FSSNF's case manager that W.D. was very disruptive during his visit and recommended that FSSNF follow through with the referral to the Child Find Program.

97. The very next day, the children's new foster mother informed FSSNF that W.D. would hit and slap other children, including his sister J.D., when he was upset, and that J.D.'s hearing had diminished in one of her ears.

98. On January 13, 2009, FSSNF's case manager observed W.D. jump on J.D. and hit her. The foster mother reported that W.D. acted out aggressively against other children unprovoked, including biting, kicking, punching, and hitting and that he seemed to have a speech problem.

99. The children's behavioral and health issues continued throughout this placement right up until the day the children were placed with Plaintiffs, A.D. and S.T., on April 30, 2009.

**FSSNF's Failure to Disclose the Children's Trauma and Serious Needs**

100. The adoption home study of Plaintiffs, A.D. and S.T., was clear that they were not equipped to take on kids with anything more than mild emotional issues.

101. Reports provided by FSSNF to A.D. and S.T. gave no indications of the children's past trauma or W.D.'s serious anger, aggression, or speech problems.

102. Prior to adoption, FSSNF knew and failed to disclose the following information:

- a. J.D. and W.D. were removed from the [REDACTED] home as a result of verified allegations of abuse, which resulted in criminal charges;
- b. J.D. and W.D. displayed clear signs of abuse and trauma while in the home of [REDACTED];
- c. W.D. had the tendency to be aggressive even when unprovoked;
- d. W.D. had the tendency to have temper tantrums;
- e. W.D. had a history of periodically wetting his bed at night, behavior that frequently reemerged after disrupted placements;
- f. W.D.'s behavior was described as erratic;
- g. W.D. required speech and language therapy;
- h. W.D. needed constant redirection;
- i. W.D. had difficulty making eye contact;
- j. J.D. frequently reverted to baby talk after disrupted placements;

- k. J.D. was being tested for possible hearing deficiencies; and
- l. J.D. and W.D. had experienced multiple placements and a failed adoption because of the inability of foster parents to cope with their special needs.

103. At the match staffing in which FSSNF ultimately chose A.D. and S.T. as appropriate adoptive parents, FSSNF acknowledged that W.D.'s previous foster mother "complained incessantly" about his "screaming and belligerent behavior."

104. Less than two weeks prior to completion of the Child Study, FSSNF's case manager was informed by the children's foster parent that W.D. was aggressive at school and didn't make eye contact.

105. However, the Child Study, prepared on December 18, 2008, omits this information entirely and falsely states that the children were moved from the [REDACTED] home in October 2006 simply because the home was closed.

106. Just one day after drafting the Child Study, the children's foster parent informed FSSNF that W.D. would hit and slap the other children in the foster home and that J.D. needed to have a follow up for hearing loss in one ear.

107. FSSNF failed to update the Child Study to include this information.

108. On January 13, 2009, FSSNF's case manager directly observed W.D. jump on J.D. and hit her, and the foster mother expressed serious concern regarding W.D.'s speech problems and unprovoked aggression with other children at home and at school, which included biting, hitting, kicking, and punching.

109. On February 18, 2009, both FSSNF's case manager and supervisor signed the record of full disclosure, which failed to provide any of the observations made on January 13<sup>th</sup> to Plaintiffs.

110. On March 5, 2009, J.D. and W.D. had pre-adoptive psychological evaluations and the reports were sent to FSSNF on March 10, 2009.

111. In addition to clinical observations at the time of the evaluation, the psychologist relied upon the record provided by FSSNF and information provided by FSSNF's case manager, who brought the children to the evaluation.

112. FSSNF's case manager failed to provide critical information to the psychologist, such that her report erroneously indicates that the foster parent reported no problems other than W.D.'s activity level and that the children were not aggressive, were well-mannered, and liked to be helpful in complete contradiction to the well-established record.

113. The psychologist noted that W.D. had multiple problems with speech and language that needed to be addressed very quickly, recommending the immediate attention of a speech and language pathologist.

114. On March 20, 2009, FSSNF forwarded the evaluations to A.D. and S.T., claiming that W.D. had been taken to a speech pathologist, who saw no issues with his articulation and did not recommend therapy.

115. Upon information and belief, FSSNF never took W.D. for a speech evaluation.

116. FSSNF pushed through an adoption to parents who were not prepared to raise children with such extensive special needs, including treatment to address extreme emotional, physical, psychological, and sexual abuse.

117. Seven (7) months post-adoption, an evaluation of W.D. on March 8, 2010 revealed that W.D.:

- a. Frequently tried to touch family members inappropriately;

- b. Tried to grab other people's genitalia and women's breasts frequently when he was upset;
- c. Tried to touch the family dog's genitalia;
- d. Exposed himself to his sister;
- e. Was confused about his gender identity;
- f. Was disruptive at school; and,
- g. "WD is a bright and engaged boy who appears to have experienced a significant degree of trauma in his young life. This trauma has not been limited to the physical and sexual abuse he has allegedly experienced, but also to his multiple foster placements and lack of consistent and caring environment prior to coming to live with [A.D. and S.T.]."

118. J.D. and W.D. require around-the-clock supervision and extensive services to ensure their health and safety due to the following:

- a. The children are unable to attend a regular daycare and must have a specially trained nanny;
- b. The children are unable to remain in a school setting for an entire day, and must instead be home schooled for the other half of each day;
- c. W.D. is in need of therapy including music therapy, occupational therapy, and related forms of intervention;
- d. W.D. requires a smaller school setting and will need one-on-one support in the classroom;
- e. J.D. suffers from severe pain when using the bathroom; and
- f. J.D.'s psychiatric condition has required hospitalization.

119. Despite requests for financial assistance to address the extensive needs of these children, FSSNF has failed to ensure that Plaintiffs receive adequate financial assistance to stabilize this adoptive home.



120. Instead, A.D. and S.T. have been forced to take extensive time off from work, and S.T. has been forced to take a demotion so that she can adequately care for the children.

121. The family is unable to have a stable nanny to assist with the children because of their extreme behavioral difficulties and extensive psychiatric needs.

122. A.D. and S.T. are also in need of counseling to help cope with the enormous strain this adoption has brought on them and their family.

### **COUNT I**

#### **NEGLIGENCE OF BOYS' HOME ASSOCIATION, INC.**

123. Plaintiffs hereby reaver and reallege paragraphs 1 through 78 as if fully set forth herein.

124. At all times material hereto, BHA had a duty to:

- a. Conduct a licensing study of [REDACTED] and certify to DCF that the potential foster home met all DCF licensing requirements in accordance with § 409.175, Florida Statutes;
- b. Conduct an appropriate screening by assessing [REDACTED] background, including, but not limited to, employment history check, check of references, local criminal records check through local law enforcement agencies, fingerprinting, statewide criminal records check through the Department of Law Enforcement, federal criminal records through the Federal Bureau of Investigation and abuse registry clearance in accordance with Rule 65C-13.009 of the Florida Administrative Code;
- c. Request Abuse Registry clearances for [REDACTED] by submitting her name, race, sex, date of birth, social security number, name of her prior spouse, and names of all of her biological children in accordance with Rule 65C-13.009 of the Florida Administrative Code;
- d. Conduct an employment history check and check of references, including at least three written references from non-relatives, with at least one school reference for children of school age in accordance with Rule 65C-13.009 of the Florida Administrative Code;

- e. Conduct an annual re-licensing study in accordance with the requirements of § 409.175, Florida Statutes and Chapter 65C of the Florida Administrative Code;
- f. To seek and obtain a waiver signed by the District or Regional Administrator prior to placement of additional foster children if the total number of children in the home was to exceed five (5), including the family's own children in accordance with § 409.175, Florida Statutes and DCF Operating Procedure 175-64;
- g. Deny, suspend, and/or revoke a foster home license upon discovery that the applicant lied or otherwise provided inaccurate or false information during the application process in accordance with § 409.175, Florida Statutes; and
- h. Deny, suspend, and/or revoke a foster home license based upon an intentional or negligent act materially affecting the health or safety of children in the home in accordance with § 409.175, Florida Statutes.

125. At all times material hereto, BHA breached the above stated duties.

126. As a direct and proximate result of BHA's negligence, J.D. and W.D. have sustained damages, including but not limited to bodily injury and resulting pain and suffering, mental anguish, loss of capacity for the enjoyment of life, and expenses of therapeutic and psychiatric treatment. The losses are permanent and will continue in the future.

WHEREFORE, Plaintiffs demand judgment for damages against the Defendant, BOYS' HOME ASSOCIATION, INC., for compensatory damages, costs, and all other such relief as the Court may deem just and proper.

## COUNT II

### NEGLIGENCE OF FAMILY SUPPORT SERVICES OF NORTH FLORIDA, INC.

127. Plaintiffs hereby reaver and reallege paragraphs 1 through 45 and 79 through 122 as if fully set forth herein.

128. At all times material hereto, FSSNF had a duty to provide J.D. and W.D. with:

- a. A reasonable and safe placement;
- b. Appropriate monitoring and supervision;
- c. Protection from harm;
- d. Reasonable and adequate care and services, including but not limited to psychiatric and psychological care;
- e. Reasonable and safe continuity of care, therapy, and case monitoring;
- f. Services in compliance with the provisions of the Florida Statutes and the Florida Administrative Code, including, but not limited to: Sections 63.039, 63.085, and 63.125, Florida Statutes, and Rules 65C-13.015, 65C-15.028, 65C-15.029, 65C-15.031, 65C-16.002, 65C-16.009, 65C-16.010, and 65C-16.013, Florida Administrative Code; and
- g. All other protections provided by Florida law to children.

129. At all times material hereto, BHA breached the above stated duties.

130. As a direct and proximate result of FSSNF's negligence, J.D. and W.D. have sustained damages, including but not limited to bodily injury and resulting pain and suffering, mental anguish, loss of capacity for the enjoyment of life, expenses of therapeutic and psychiatric treatment, aggravation of previously existing condition, and unnecessary, inappropriate delays in treating pre-existing conditions, thereby compounding the situation in depriving J.D. and W.D.'s need of therapy and ongoing support services. The losses are permanent and will continue in the future.

131. Furthermore, as a direct and proximate result of FSSNF's negligence, the adoptive parents, A.D. and S.T., have incurred extraordinary expenses and provided care and services to J.D. and W.D., all of which are compensable.

WHEREFORE, Plaintiffs demand judgment for damages against the Defendant, FAMILY

SUPPORT SERVICES OF NORTH FLORIDA, INC. for compensatory damages, costs, and all other such relief as the Court may deem just and proper.

### **COUNT III**

#### **WRONGFUL ADOPTION BASED ON NEGLIGENT MISREPRESENTATIONS AND CONCEALMENT BY FAMILY SUPPORT SERVICES OF NORTH FLORIDA**

132. Plaintiffs hereby reaver and reallege paragraphs 1 through 45 and 79 through 122 as if fully set forth herein.

133. At all times material hereto, FSSNF had a duty to fully and completely disclose and fully investigate the history of the children to ensure disclosure of all information and records it had concerning J.D. and W.D., including psychosocial history, behavioral status and predictors, psychiatric and mental health history, and to comply with all the provisions of the Florida Statutes and the Florida Administrative Code, including, but not limited to: §§ 63.039, 63.085, and 63.125, Florida Statutes, and Rules 65C-15.028, 65C-15.029, 65C-15.031, 65C-16.002, 65C-16.009, 65C-16.013 of the Florida Administrative Code, so that the suitability for adoption could be reasonably considered on a fully informed basis by the adoptive parents, A.D. and S.T.

134. Instead, during the pre-adoption period, FSSNF failed to fully investigate, misrepresented, and/or deliberately concealed the material facts regarding J.D.'s and W.D.'s history of trauma and serious behavioral needs thereby breaching the above stated duties.

135. FSSNF knew or should have known of said misrepresentations and/or concealments.

136. In making misrepresentations and/or concealing information regarding the suitability of J.D. and W.D. for adoption, FSSNF knew or should have known that the adoptive parents, A.D. and S.T., would rely on said misrepresentations and the lack of complete information in making their

decision to adopt J.D. and W.D.

137. A.D. and S.T. relied on said information and adopted the children in August 2009.

138. Plaintiffs, A.D. and S.T., have sustained damages, including but not limited to mental anguish, loss of capacity for the enjoyment of life, expenses for the children's therapeutic and psychiatric treatment, expenses for specialized one-on-one care in school, and expenses for a specially trained nanny. Losses are permanent and continuing and the Plaintiffs will continue to suffer the losses in the future.

WHEREFORE, Plaintiffs demand judgment for damages against the Defendant, FAMILY SUPPORT SERVICES OF NORTH FLORIDA, INC. for compensatory damages, costs, and all other such relief as the Court may deem just and proper.

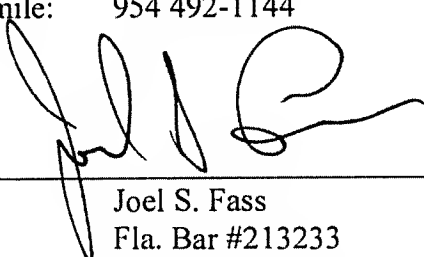
**DEMAND FOR JURY TRIAL**

Plaintiffs hereby demand a trial by jury of all issues so triable in this case.

DATED this 21 day of September, 2012.

COLODNY, FASS, TALENFELD, KARLINSKY,  
ABATE & WEBB, P.A.  
Attorneys for Plaintiffs  
One Financial Plaza - 23rd Floor  
100 S.E. Third Avenue  
Fort Lauderdale, Florida 33394  
Telephone: 954 492-4010  
Facsimile: 954 492-1144

By: \_\_\_\_\_

  
Joel S. Fass  
Fla. Bar #213233  
[jfass@cftlaw.com](mailto:jfass@cftlaw.com)  
[sschmerling@cftlaw.com](mailto:sschmerling@cftlaw.com)

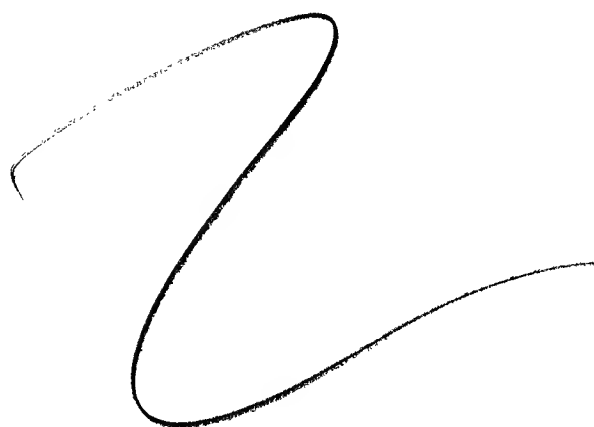
A handwritten signature in black ink, featuring a large, stylized 'Z' shape with a long, sweeping tail that curves upwards and to the right.

EXHIBIT "B"

A handwritten signature in black ink, featuring a large, stylized 'Z' shape with a long, sweeping tail that curves upwards and to the right.

EXHIBIT "B"

IN THE CIRCUIT COURT, FOURTH  
JUDICIAL CIRCUIT, IN AND FOR  
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2011-CA-2567  
DIVISION: CV-D

A.D. and S.T., individually and on behalf  
of their adoptive children, J.D. and W.D.,

Plaintiffs,

vs.

FAMILY SUPPORT SERVICES OF  
NORTH FLORIDA, INC., a Florida  
corporation, and BOYS' HOME  
ASSOCIATION, INC., a Florida  
corporation,

Defendants.

---

**FSSNF'S ANSWER AND AFFIRMATIVE DEFENSES  
TO FIRST AMENDED COMPLAINT**

Pursuant to Florida Rules of Civil Procedure 1.110 and 1.140, Defendant Family Support Services of North Florida, Inc. ("FSSNF"), by and through its undersigned attorneys, answers and asserts affirmative defenses to Counts II and III of the First Amended Complaint, and says:

### **Jurisdiction and Venue**

1. FSSNF admits, for venue purposes only, the allegations contained in paragraph one of the First Amended Complaint.

2. FSSNF admits, for jurisdictional purposes only, the allegations contained in paragraph two of the First Amended Complaint.

### **The Parties**

3. FSSNF admits the allegations contained in paragraph three of the First Amended Complaint.

4. FSSNF admits the allegations contained in paragraph four of the First Amended Complaint.

5. FSSNF admits the allegations contained in paragraph five of the First Amended Complaint.

6. FSSNF admits in response to the allegations contained in paragraph six of the First Amended Complaint that J.D and W.D. were adjudicated dependent but otherwise denies the remaining allegations.

7. FSSNF admits in response to the allegations contained in paragraph seven of the First Amended Complaint that A.D. and S. T. adopted J.D. and W.D.



pursuant to a Final Judgment of Adoption but otherwise denies the remaining allegations.

8. The allegations contained in paragraph eight of the First Amended Complaint do not require a response.

9. The allegations contained in paragraph nine of the First Amended Complaint do not require a response.

10. FSSNF admits that it is a non-profit Florida corporation and that its principal place of business is in Duval County, Florida.

11. FSSNF denies the allegations contained in paragraph eleven of the First Amended Complaint.

12. FSSNF denies the allegations contained in paragraph twelve of the First Amended Complaint.

13. FSSNF is without knowledge and therefore denies the allegations contained in paragraph thirteen of the First Amended Complaint.

### **General Allegations**

14. Upon information and belief, FSSNF admits in response to the allegations contained in paragraph fourteen of the First Amended Complaint that J.D. and W.D. were removed from their biological mother but is without knowledge of and therefore denies, any remaining allegations.

15. Upon information and belief, FSSNF admits in response to the allegations contained in paragraph fifteen of the First Amended Complaint that Family Matters of Nassau County (FMNC) managed J.D. and W.D.'s case but is without knowledge of and therefore denies, any remaining allegations.

16. Upon information and belief, FSSNF admits in response to the allegations contained in paragraph sixteen of the First Amended Complaint that FMNC placed J.D. and W.D. in the foster home of Annette Smith but is without knowledge of, and therefore denies, any remaining allegations.

17. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph seventeen of the First Amended Complaint.

18. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph eighteen of the First Amended Complaint.

19. Upon information and belief, FSSNF admits in response to the allegations contained in paragraph nineteen of the First Amended Complaint that J.D. and W.D. were removed from the Smith home but is without knowledge of, and therefore denies, any remaining allegations.

20. Upon information and belief, FSSNF admits in response to the allegations contained in paragraph twenty of the First Amended Complaint that FMNC placed J.D. and W.D. in the foster home of [REDACTED]

21. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph twenty-one of the First Amended Complaint.

22. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph twenty-two of the First Amended Complaint.

23. FSSNF denies the allegations contained in paragraph twenty-three of the First Amended Complaint.

24. FSSNF admits in response to the allegations contained in paragraph twenty-four of the First Amended Complaint that it became the lead agency for community-based foster care, adoption and related services in Nassau County in or about September 2007 and at that time took over J.D. and W.D.'s case.

25. FSSNF denies the allegations contained in paragraph twenty-five of the First Amended Complaint.

26. FSSNF denies the allegations contained in paragraph twenty-six of the First Amended Complaint.

27. FSSNF denies the allegations contained in paragraph twenty-seven of the First Amended Complaint.

28. FSSNF denies the allegations contained in paragraph twenty-eight of the First Amended Complaint.

29. FSSNF denies the allegations contained in paragraph twenty-nine of the First Amended Complaint.

30. FSSNF admits in response to the allegations contained in paragraph thirty of the First Amended Complaint that it placed J.D. and W.D. with a potential adoptive family in Virginia in or about April 2008 but denies any remaining allegations.

31. FSSNF denies the allegations contained in paragraph thirty-one of the First Amended Complaint.

32. FSSNF denies the allegations contained in paragraph thirty-two of the First Amended Complaint.

33. FSSNF denies the allegations contained in paragraph thirty-three of the First Amended Complaint.

34. FSSNF denies the allegations contained in paragraph thirty-four of the First Amended Complaint.

35. FSSNF admits in response to the allegations contained in paragraph thirty-five of the First Amended Complaint that it did not place J.D. and W.D. in the Kathy Smith home for adoption and otherwise denies all remaining allegations.

36. FSSNF denies the allegations contained in paragraph thirty-six of the First Amended Complaint.

37. FSSNF denies the allegations contained in paragraph thirty-seven of the First Amended Complaint.

38. FSSNF denies the allegations contained in paragraph thirty-eight of the First Amended Complaint.

39. FSSNF denies the allegations contained in paragraph thirty-nine of the First Amended Complaint.

40. FSSNF denies the allegations contained in paragraph forty of the First Amended Complaint.

41. FSSNF denies the allegations contained in paragraph forty-one of the First Amended Complaint.

42. FSSNF admits in response to the allegations contained in paragraph forty-two of the First Amended Complaint that J.D. and W.D. were transported to the prospective adoptive home of A.D. and S.T. in Victoria, British Columbia on or about April 29, 2009.

43. FSSNF admits in response to the allegations contained in paragraph forty-three of the First Amended Complaint that J.D. and W.D. were adopted by Plaintiffs A.D. and S.T. through the Florida court system in or about September 2009.

44. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph forty-four of the First Amended Complaint.

45. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph forty-five of the First Amended Complaint.

**BHA's Licensing of [REDACTED] Home**

46. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph forty-six of the First Amended Complaint.

47. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph forty-seven of the First Amended Complaint.

48. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph forty-eight of the First Amended Complaint.

49. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph forty-nine of the First Amended Complaint.

50. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph fifty of the First Amended Complaint.

51. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph fifty-one of the First Amended Complaint.

52. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph fifty-two of the First Amended Complaint.

53. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph fifty-three of the First Amended Complaint.

54. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph fifty-four of the First Amended Complaint.

55. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph fifty-five of the First Amended Complaint.

56. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph fifty-six of the First Amended Complaint.

57. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph fifty-seven of the First Amended Complaint.

58. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph fifty-eight of the First Amended Complaint.

59. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph fifty-nine of the First Amended Complaint.

60. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph sixty of the First Amended Complaint.

61. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph sixty-one of the First Amended Complaint.



62. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph sixty-two of the First Amended Complaint.

63. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph sixty-three of the First Amended Complaint.

64. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph sixty-four of the First Amended Complaint.

65. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph sixty-five of the First Amended Complaint.

66. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph sixty-six of the First Amended Complaint.

67. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph sixty-seven of the First Amended Complaint.

68. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph sixty-eight of the First Amended Complaint.

69. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph sixty-nine of the First Amended Complaint.

70. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph seventy of the First Amended Complaint.

71. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph seventy-one of the First Amended Complaint.

72. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph seventy-two of the First Amended Complaint.

73. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph seventy-three of the First Amended Complaint.

74. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph seventy-four of the First Amended Complaint.

75. Upon information and belief, FSSNF denies the allegations contained in paragraph seventy-five of the First Amended Complaint.

76. Upon information and belief, FSSNF admits in response to the allegations contained in paragraph seventy-six that J.D. and W.D. were removed from the [REDACTED] home but is without knowledge of and therefore denies, the remaining allegations.

77. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph seventy-seven of the First Amended Complaint.

78. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph seventy-eight of the First Amended Complaint.

**FSSNF's Alleged Failure to Protect J.D. and W.D.**

79. FSSNF admits in response to the allegations contained in paragraph seventy-nine of the First Amended Complaint that upon taking over J.D. and W.D.'s case, they had been in the foster home of [REDACTED] since in or about October 2006 and otherwise denies the remaining allegations.

80. FSSNF denies the allegations contained in paragraph eighty of the First Amended Complaint.

81. FSSNF denies the allegations contained in paragraph eighty-one of the First Amended Complaint.

82. FSSNF denies the allegations contained in paragraph eighty-two of the First Amended Complaint.

83. FSSNF denies the allegations contained in paragraph eighty-three of the First Amended Complaint.

84. FSSNF denies the allegations contained in paragraph eighty-four of the First Amended Complaint.

85. FSSNF denies the allegations contained in paragraph eighty-five of the First Amended Complaint.

86. FSSNF admits the allegations contained in paragraph eighty-six of the First Amended Complaint.

87. FSSNF denies the allegations contained in paragraph eighty-seven of the First Amended Complaint.

88. FSSNF admits in response to the allegations contained in paragraph eighty-eight of the First Amended Complaint that the [REDACTED] family informed FSSNF that they did not want to proceed with the adoption of J.D. and W.D. and otherwise denies the remaining allegations.

89. FSSNF denies the allegations contained in paragraph eighty-nine of the First Amended Complaint.

90. FSSNF denies the allegations contained in paragraph ninety of the First Amended Complaint.

91. FSSNF admits in response to the allegations contained in paragraph ninety-one of the First Amended Complaint that it placed J.D. and W.D in the Poston foster home in Callahan, Florida and otherwise denies the remaining allegations.

92. FSSNF denies the allegations contained in paragraph ninety-two of the First Amended Complaint.

93. FSSNF denies the allegations contained in paragraph ninety-three of the First Amended Complaint.

94. FSSNF denies the allegations contained in paragraph ninety-four of the First Amended Complaint.

95. FSSNF admits in response to the allegations contained in paragraph ninety-five of the First Amended Complaint that J.D. and W.D. were removed from the Poston foster home and placed in a new foster home and denies any remaining allegations.

96. FSSNF denies the allegations contained in paragraph ninety-six of the First Amended Complaint.

97. FSSNF denies the allegations contained in paragraph ninety-seven of the First Amended Complaint.

98. FSSNF denies the allegations contained in paragraph ninety-eight of the First Amended Complaint.

99. FSSNF denies the allegations contained in paragraph ninety-nine of the First Amended Complaint.

**FSSNF's Alleged Failure to Disclose  
the Children's Trauma and Serious Needs**

100. FSSNF denies the allegations contained in paragraph one hundred of the First Amended Complaint.

101. FSSNF denies the allegations contained in paragraph one hundred one of the First Amended Complaint.

102. FSSNF denies the allegations contained in paragraph one hundred two of the First Amended Complaint.

103. FSSNF denies the allegations contained in paragraph one hundred three of the First Amended Complaint.

104. FSSNF denies the allegations contained in paragraph one hundred four of the First Amended Complaint.

105. FSSNF denies the allegations contained in paragraph one hundred five of the First Amended Complaint.

106. FSSNF denies the allegations contained in paragraph one hundred six of the First Amended Complaint.

107. FSSNF denies the allegations contained in paragraph one hundred seven of the First Amended Complaint.

108. FSSNF denies the allegations contained in paragraph one hundred eight of the First Amended Complaint.

109. FSSNF denies the allegations contained in paragraph one hundred nine of the First Amended Complaint.

110. FSSNF admits in response to the allegations contained in paragraph one hundred ten of the First Amended Complaint that J.D. and W.D. had pre-adoptive psychological evaluations in or about March 2009 and that the psychological reports were furnished to FSSNF in or about March 2009.

111. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph one hundred eleven of the First Amended Complaint.

112. FSSNF denies the allegations contained in paragraph one hundred twelve of the First Amended Complaint.

113. In response to the allegations contained in paragraph one hundred thirteen of the First Amended Complaint, FSSNF asserts that the psychologist's report speaks for itself and any allegations inconsistent therewith are denied.

114. FSSNF admits in response to the allegations contained in paragraph one hundred fourteen of the First Amended Complaint that the psychological evaluations of J.D. and W.D. were provided to A.D. and S.T. and otherwise denies the remaining allegations.

115. FSSNF denies the allegations contained in paragraph one hundred fifteen of the First Amended Complaint.

116. FSSNF denies the allegations contained in paragraph one hundred sixteen of the First Amended Complaint.

117. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph one hundred seventeen of the First Amended Complaint.



118. FSSNF is without knowledge of, and therefore denies, the allegations contained in paragraph one hundred eighteen of the First Amended Complaint.

119. FSSNF denies the allegations contained in paragraph one hundred nineteen of the First Amended Complaint.

120. FSSNF denies the allegations contained in paragraph one hundred twenty of the First Amended Complaint.

121. FSSNF denies the allegations contained in paragraph one hundred twenty-one of the First Amended Complaint.

122. FSSNF denies the allegations contained in paragraph one hundred twenty-two of the First Amended Complaint.

**Count I**  
**Alleged Negligence of Boys' Home Association, Inc.**

123-126. Count I is directed to a defendant other than FSSNF, and no response to Count I is required of FSSNF. To the extent a response is required, FSSNF denies the allegations contained in paragraphs 123 through 126 of the First Amended Complaint.

**Count II**  
**Alleged Negligence of Family Support Services of North Florida, Inc.**

127. FSSNF re-alleges, and incorporates as if fully set forth herein, its responses contained in paragraphs 1 through 45 and 79 through 122.

128. FSSNF admits in response to the allegations contained in paragraph one hundred twenty-eight of the First Amended Complaint that it had a duty to comply with certain statutes and administrative code provisions and denies any allegations to the extent inconsistent therewith.

129. FSSNF denies the allegations contained in paragraph one hundred twenty-nine of the First Amended Complaint.

130. FSSNF denies the allegations contained in paragraph one hundred thirty of the First Amended Complaint.

131. FSSNF denies the allegations contained in paragraph one hundred thirty-one of the First Amended Complaint.

WHEREFORE, Defendant Family Support Services of North Florida, Inc. demands judgment in its favor, together with an award of costs, and all such further and additional relief as this court may deem just and proper.

**Count III**  
**Alleged Wrongful Adoption Based on Alleged Negligent Misrepresentations**  
**and Concealment by Family Support Services of North Florida**

132. FSSNF re-alleges, and incorporates as if fully set forth herein, its responses contained in paragraphs 1 through 45 and 79 through 122.

133. FSSNF states that its legal duties are defined in various Florida Statutes and Administrative Code provisions, and denies the allegations contained in paragraph one hundred thirty-three of the First Amended Complaint to the extent inconsistent with the controlling statutes and code provisions.

134. FSSNF denies the allegations contained in paragraph one hundred thirty-four of the First Amended Complaint.

135. FSSNF denies the allegations contained in paragraph one hundred thirty-five of the First Amended Complaint.

136. FSSNF denies the allegations contained in paragraph one hundred thirty-six of the First Amended Complaint.

137. FSSNF denies the allegations contained in paragraph one hundred thirty-seven of the First Amended Complaint.

138. FSSNF denies the allegations contained in paragraph one hundred thirty-eight of the First Amended Complaint.

WHEREFORE, Defendant Family Support Services of North Florida, Inc. demands judgment in its favor, together with an award of costs, and all such further and additional relief as this court may deem just and proper.

### **AFFIRMATIVE DEFENSES**

#### **FIRST AFFIRMATIVE DEFENSE (Sovereign Immunity)**

With respect to all matters alleged in the Amended Complaint, FSSNF has performed public functions normally performed by governmental agencies and is entitled to sovereign immunity protections and damages caps.

#### **SECOND AFFIRMATIVE DEFENSE (Statutory Damages Cap)**

Pursuant to section 409.1671(h), Florida Statutes, any damages attributable to FSSNF are capped.

#### **THIRD AFFIRMATIVE DEFENSE (Section 39.011(1) Statutory Immunity)**

Pursuant to section 39.011(1), Florida Statutes, FSSNF is not liable for any of the claims asserted in this lawsuit as any failure to provide services by FSSNF did

not occur as a result of bad faith or malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

**FOURTH AFFIRMATIVE DEFENSE**  
**(Section 39.011(2) Statutory Immunity)**

Pursuant to section 39.011(2), Florida Statutes, FSSNF is not liable for any of the claims asserted in this lawsuit as any inability or failure of FSSNF to provide services did not occur in a manner exhibiting wanton or willful disregard of human rights, safety, or property.

**FIFTH AFFIRMATIVE DEFENSE**  
**(Section 39.203(1)(a) Statutory Immunity)**

Pursuant to section 39.203(1)(a), Florida Statutes, FSSNF is not liable for any of the claims asserted in this lawsuit for all the claims alleged against it in this lawsuit arise from FSSNF's participation in good faith in acts authorized or required by Chapter 39.

**SIXTH AFFIRMATIVE DEFENSE**  
**(No Vicarious Liability Pursuant to § 409.1671(h))**

FSSNF is the lead community based provider in Duval County and Nassau County, Florida. Pursuant to Section 409.1671(h): "The lead community-based provider shall not be liable in tort for the acts or omissions of its subcontractors or

the officers, agents, or employees of its subcontractors.” Thus, FSSNF cannot be held liable for the acts or omissions of BHA, or any of its other subcontractors or the officers, agents, or employees of any of its subcontractors.

**SEVENTH AFFIRMATIVE DEFENSE  
(Comparative Fault)**

Pursuant to section 768.81, Florida Statutes, any judgment entered against FSSNF in this action should be based on its percentage of fault, and not on the basis of the doctrine of joint and several liability. The damages suffered by Plaintiffs are believed to have been caused, in whole or in part, by the conduct of Plaintiffs, and perhaps other parties and non-parties to this action, such as Boys’ Home Association, Inc., Family Matters of Nassau County, and Annette Smith. Other currently unknown persons or entities may also be of fault, in whole or in part, for causing this incident, and as such parties are identified in discovery, this affirmative defense will be amended to include them as at-fault parties. Fault for the incident should be allocated to all parties and non-parties responsible for the incident, and the fault allocated to these parties and non-parties should reduce the amount of any damages found due and owing by FSSNF.

**EIGHTH AFFIRMATIVE DEFENSE**  
**(Collateral Sources of Indemnity)**

Pursuant to section 768.76, Florida Statutes, any damages awarded in this action should be reduced by the total of all amounts which have been paid for the benefit of Plaintiffs, or which are otherwise available to Plaintiffs, from all collateral sources.

**NINTH AFFIRMATIVE DEFENSE**  
**(Set Off)**

Pursuant to section 768.041, Florida Statutes, to the extent FSSNF establishes that Plaintiffs, or any person on Plaintiffs' behalf, has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of the damages sued for, FSSNF is entitled to set off this amount from the amount of any judgment to which Plaintiffs would be otherwise entitled.

**TENTH AFFIRMATIVE DEFENSE**  
**(Alternative Methods of Payment of Damage Awards)**

Pursuant to Section 768.78, Florida Statutes, FSSNF asserts the right to select or seek court authorization of alternative methods of the payment of any damages that may be awarded against it in this action.

**ELEVENTH AFFIRMATIVE DEFENSE**  
**(Failure to Comply with Sovereign Immunity Conditions Precedent)**

All conditions precedent to the bringing of this action have not occurred, been performed, or been waived. Specifically, the notice provisions of the waiver of the sovereign immunity statute, Section 768.28, Florida Statutes, have not been complied with respect to FSSNF.

**TWELFTH AFFIRMATIVE DEFENSE**  
**(Complete Disclosure)**

Plaintiffs' were given complete disclosure of the children's physical, medical and mental health records during pre-adoptive placement and during the adoption presentation, in accordance with Florida Administrative Code 65C-16.002(7)(a-c) and (8).

**THIRTEENTH AFFIRMATIVE DEFENSE**  
**(Waiver)**

Plaintiffs' actions in declining any services to address the children's behaviors during the adoption process and while the adoption was finalized have resulted in a waiver of Plaintiffs' claims.



**FOURTEENTH AFFIRMATIVE DEFENSE**  
**(Estoppel)**

Plaintiffs' are receiving an enhanced adoption subsidy to provide additional financial assistance for therapeutic services and as such are estopped from asserting the instant claims.

**FIFTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs cannot maintain their claims for damages, including treatment, support and services expenses, because they have failed to exhaust the administrative remedies available to them before initiating their claims.

**SIXTEENTH AFFIRMATIVE DEFENSE**  
**(Incorporation of Other Defenses)**

Pursuant to Florida Rule of Civil Procedure 1.130(b), FSSNF hereby incorporates, as if fully set forth herein, each and every affirmative defense asserted by every other defendant in this action.

WHEREFORE, Defendant Family Support Services of North Florida, Inc. demands judgment in its favor, together with an award of costs, and all such further and additional relief as this Court may deem just and proper.

BEDELL, DITTMAR, DeVAULT, PILLANS & COXE  
Professional Association

By: s/Courtney K. Grimm

Courtney K. Grimm

Florida Bar No. 953740

Primary: cgrimm@bedellfirm.com

Secondary: mmoon@bedellfirm.com

R.H. Farnell II

Florida Bar No. 019267

Primary: rhf@bedellfirm.com

Secondary: mmoon@bedellfirm.com

The Bedell Building

101 East Adams Street

Jacksonville, Florida 32202

Facsimile: (904) 353-9703

Counsel for Family Support Services of North Florida,  
Inc.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by E-mail this 26<sup>th</sup> day of October, 2012, to:

Joel S. Fass

Primary: jass@cftlaw.com

Secondary: sschmerling@cftlaw.com

sgilbert@cftlaw.com

Matthew J. Haftel

Primary: mhaftel@oconlaw.com

Secondary: mwilliams@oconlaw.com

mramsey@oconlaw.com

s/Courtney K. Grimm

Attorney